MVPDs	Subs	Pre Merger Competitive Overlap with Comcast	Post Merger Competitive Overlap with Comcast	Difference	Competitive Overlap with BHN	Total Difference
DIRECTV	20.2M	{{[redacted]}}	{{[redacted]}}	{{[redacted]}}	3%	{{[redacted]}}
DISH Network	14.1M	{{[redacted]}}	{{[redacted]}}	{{[redacted]}}	3%	{{[redacted]}}
NCTC	9.0M	{{[redacted]}}	{{[redacted]}}	{{[redacted]}}	4%	{{[redacted]}}
Verizon	5.4M	{{[redacted]}}	{{[redacted]}}	{{[redacted]}}	7%	{{[redacted]}}
AT&T[43]	5.9M	N/A	N/A	N/A	N/A	N/A

Professor Biglaiser also identifies an additional vertical price effect present, but not recognized by the Commission in its review of the Comcast-NBCU merger, that will be continued and enhanced by the instant transaction. He demonstrates that the vertical ownership of programming by Comcast harms not only subscribers of rival MVPDs, but also Comcast subscribers. Acquisition of the NBCU programming gave Comcast an incentive to raise prices to its own subscribers because post-merger, it profits even from subscribers departing as a result of its actions, who then subscribe to another MVPD, by selling the NBCU programming to those other MVPDs.

> This effect will increase Comcast's incentive to raise its own subscription price, and is in addition to the increased opportunity cost effect previously identified with respect to the Comcast-NBCU merger. With this higher opportunity cost, Comcast will charge more for programming to its subscribers, but will experience less loss in profit due to subscriber defections. Thus, not only were Comcast's rivals hurt by the merger with NBCU, but Comcast's own subscribers were hurt.[44]

[43] Due to lack of reliable data on the video footprint of AT&T U-verse's service, it is not possible to reach a conclusion about the competitive increase or decrease for its 5.9 million subscribers.

[44] Biglaiser at 20.

From this Professor Biglaiser concludes that post-transaction, Comcast's incentive to raise its rivals' costs will increase due to its enlarged subscriber base, and that the pricing effects on Comcast customers will further increase as a direct result.[45]

Additionally, the efficiencies claimed by the parties in the application may also lead to increased prices for consumers. As explained by Professor Biglaiser, "the alleged efficiencies due to the merger will result in higher profit per Comcast subscriber. This will increase the opportunity cost to Comcast of providing programming to rival MVPDs in areas where it is acquiring systems and where its current systems exist and thus increase the cost of such programs."[46] In conclusion, "the result of higher profitability per subscriber will increase Comcast's opportunity cost of selling its programming to competitors, which will lead to higher prices for competitors to buy Comcast's programming."[47]

C. The Proposed Transaction Threatens Two Types of Horizontal Harm

Two sets of horizontal harms are created by the merger of Comcast and TWC. The first concerns the addition of TWC's RSNs in Los Angeles and New York City to the vast array of programming offered by Comcast. The second concerns the increased bargaining power with respect to its programming that Comcast will attain by increasing its subscriber base from 21.1 million to up to 31.4 million video subscribers (to the extent Comcast negotiates on behalf of Bright House Networks and Midcontinent). By adding TWC's RSNs in the two largest media markets in the country, Los Angeles and New York, where Comcast also owns the NBC stations,

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[45] Biglaiser at 20-21.

[46] Biglaiser at 22.

[47] Biglaiser at 22.

Comcast will be able to charge more for the pair of programming assets than Comcast and TWC could have charged for each programming asset when owned separately. Furthermore, by increasing its subscriber count by about 49%, Comcast will be able to obtain lower prices from programmers and this will increase Comcast's profit per subscriber and thus its opportunity cost of selling programming to rival MVPDs. This, in turn, will harm these MVPDs' subscribers.

1. Horizontal harm through the combination of key Comcast and TWC programming assets in Los Angeles and New York.

The Commission has repeatedly recognized that horizontal integration of programming can increase the rates paid by small and mid-size MVPDs. In the *Comcast-NBCU Order* it noted that the "ability of a company to obtain greater bargaining power because of a horizontal transaction is a well-established concern in antitrust enforcement."[48] Continuing, the Commission cited evidence that "when a single entity controlled the local broadcast rights to multiple broadcast networks that entity was able to secure a substantial bargaining advantage in retransmission consent negotiations with the local MVPD, leading to an increase in retransmission consent fees of at least 20 percent."[49] The Commission most recently utilized this bargaining theory in its decision to prohibit the collusive practice of separately owned broadcast stations in the same DMA jointly negotiating retransmission consent as contrary to the public interest.[50] The basis for this decision rested upon its finding that, by coordinating their

[48] *Comcast-NBCU Order*, 26 FCC Rcd at 4294, ¶ 135.

[49] *Comcast-NBCU Order*, 26 FCC Rcd at 4295, ¶ 137.

[50] *Amendment of the Commission's Rules Related to Retransmission Consent*, Report and Order and Further Notice of Proposed Rulemaking, 29 FCC Rcd 3351, 3358, ¶ 13 (2014). ("Joint Negotiation Order").

negotiations, broadcasters could suppress competition in local television markets and thereby command higher prices than each station could obtain by negotiating individually.[51]

Through the acquisition of TWC, Comcast will acquire two RSNs in the two largest cities in the country, Los Angeles and New York. As explained below and in the accompanying analysis by Professor Biglaiser, by combining control over Comcast's and TWC's must have RSNs, the post-transaction Comcast-TWC will have the ability to command higher prices for the programming, especially in markets where MVPDs distribute both a Comcast RSN and an NBC owned and operated station.[52] The Commission recognized the possibility for this precise harm in the *Comcast-NBCU Order,* where it found that Comcast's ability to increase MVPDs' costs by negotiating for the same types of programming together would raise prices to consumers and weaken the ability of smaller MVPDs to compete, both significant public interest harms.[53]

As Professor Biglaiser demonstrates, this combined ownership of key programming assets will further increase Comcast's post-transaction bargaining power and allow it to charge higher fees for this programming.[54] Professor Biglaiser notes that when a programmer and an MVPD negotiate the fee that the MVPD will pay the programmer, they are basically deciding how to divide the joint economic gains created from having the MVPD carry the programming. A programmer selling two different networks will be able to charge more by bundling the networks together, as long as the networks are substitutes in the sense that the marginal value of

[51] Joint Negotiation Order, 29 FCC Rcd at 3358, ¶13.

[52] Biglaiser at 17.

[53] *Comcast-NBCU Order*, 26 FCC Rcd at 4295, ¶ 135.

[54] Biglaiser at 25.

either of the networks to the MVPD is lower conditioned upon already carrying the other network. For this analysis to hold, it is not required that the networks are close substitutes; rather, the analysis turns on "the fact that the value of additional networks has diminishing value to an MVPD."[55]

The Commission agreed with this assessment in both the *Comcast-NBCU Order* and its retransmission consent reform rulemaking. In the merger review, the Commission examined the case of a Fox O&O and a Fox RSN in the same DMA under the joint ownership of News Corp relative to a control group of RSNs not under joint ownership with a broadcast station.[56] The Commission found "that joint ownership of these two types of programming assets in the same region allowed the joint venture to charge a higher price for the RSN relative to what would be observed if the RSN and the local broadcast affiliate were separately owned."[57] This result held for five years after the horizontal integration of the RSN and the owned and operated broadcast station.[58] The result will be no different once Comcast gains control of TWC's RSNs in Los Angeles and New York, and will be similarly contrary to the public interest.

2. Horizontal harm arising from the vastly increased horizontal scale of Comcast.

Similar to the harm that flows directly from the ownership by Comcast and TWC of programming, the combined firm's increased bargaining power has the potential, independently and in combination with its potential to leverage its ownership of key programming assets, to

[55] Biglaiser at 26.

[56] Biglaiser at 26.

[57] *Comcast-NBCU Order*, 26 FCC Rcd at 4399, Appendix B, ¶ 55.

[58] *Comcast-NBCU Order*, 26 FCC Rcd at 4399, Appendix B, ¶ 55.

damage small MVPDs. Whether or not its proposed divestitures to Charter cure direct antitrust issues related to that increased purchasing power, the effect of the transaction even with the divestitures appears likely to harm all small MVPDs.

As explained by Professor Biglaiser, in the cable television industry, programmers traditionally offer volume discounts based on the number of subscribers an MVPD serves.[59] Prior to the transaction, Comcast was the largest MVPD in the United States with approximately 21.1 million subscribers. Excluding the two DBS providers, TWC was the second largest cable operator, with approximately 11.4 million subscribers. As the first and second largest cable operators in the country, Comcast and TWC were able to command the best and most competitive rates from programmers. After the transaction and the proposed divestitures, a combined Comcast-TWC will have approximately 31.4 million video subscribers (to the extent Comcast negotiates on behalf of Bright House Networks and Midcontinent), giving Comcast more than 30% of video subscribers across the country. Charter, through the proposed divestiture of subscribers from Comcast, will become the second largest cable operator in the country, with 5.6 million video customers. Through the divestiture and creation of SpinCo, for whom Charter will offer programming negotiating services, Charter will also gain leverage as its programming negotiator. In short, the largest operators will have gotten larger relative to ACA's membership.

If the transaction is approved, programmers will be negotiating with an MVPD that holds approximately one third of subscribers nationwide. With this many subscribers, Comcast will be able to negotiate for even better rates, as programmers will be induced to accept these lower rates

[59] Biglaiser at 29.

to continue to get their programming in front of as many consumers as possible.[60] Further, as explained by Professor Biglaiser, by obtaining lower prices, Comcast will increase its profitability per subscriber, which will lead to an increase in the opportunity cost for Comcast to sell its programming to rival MVPDs, and, in turn, lead to higher Comcast programming costs for these MVPDs, increases which will in part be borne by subscribers.[61]

Professor Biglaiser also explains why Comcast's position that the transaction will not increase its market power as a programming purchaser is highly unlikely.[62] After noting that Comcast's economists treat the programming market as if being a large buyer does not increase a firm's market power because no individual MVPD is essential for any give programmer or broadcaster to profitably be in the market, Professor Biglaiser explains:

> Unfortunately, in the programming market it is well-known that larger MVPDs get much better programming rates than smaller ones. It flies in the face of reality to think that by enlarging, Comcast will gain no additional market power as a purchaser in the programming market. If Comcast lost market power, and had to pay higher prices, then this would be a very large incentive not to merge with TWC. The merger will lead to higher profitability per subscriber due to the lower costs of buying programs, and again, a higher opportunity cost for Comcast to selling its programs to its competitors. Furthermore, and most strikingly, if TWC and Comcast thought that the merger would mean paying higher programming prices, then they would not allow {{[redacted]}} This is another piece of evidence suggesting Comcast will get better pricing from programmers as a result of the transaction with TWC and Charter.[63]

In his Declaration, Rich Fickle, CEO and President of NCTC, explains his view that if the deal is approved, programming vendors will receive less value for their programming in the near

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[60] *See* Biglaiser at 29; Fickle Declaration, ¶ 7.

[61] Biglaiser at 27.

[62] Biglaiser at 27-28.

[63] Biglaiser at 28.

term from the combined companies than they would receive if the companies remained under separate ownership and control.

> First, to the extent permissible, Comcast will bring the TWC systems under its existing programming agreements where the per-subscriber price paid by Comcast is lower. This will result in the programmers receiving less revenue from the TWC systems than they receive today. Second, as a result of growing from 21.1 million to up to 31.4 million video subscribers (to the extent Comcast negotiates on behalf of Bright House Networks and Midcontinent), Comcast will be in a better position to harm programmers by withholding or threatening to withhold access to its increased subscriber base. Accordingly Comcast will be able to obtain lower programming prices from its programming suppliers. Third, as a result of Charter's subscriber base growing from 4.2 million to up to 8 million subscribers (to the extent it negotiates on behalf of SpinCo), Charter will also have more bargaining power against the programmers, and be able to command better rates, terms and conditions from programmers.[64]

Based on his long experience in the industry, Mr. Fickle expects that, as a result of the ability of Comcast and Charter to pay less for programming, "the largest programming/media companies – which have significant bargaining leverage – will extract higher fees and more onerous terms and conditions from other MVPDs in the market and NCTC" and that the transaction will increase the already significant difference between programming fees paid by Comcast and those paid by NCTC members.[65] Finally, he attests to the fact that he has witnessed this "seesaw" effect playing out in the marketplace today.

> Currently, NCTC faces increased demands from programmers resulting from the concessions that they grant large MVPDs such as Comcast and TWC. Programmers acknowledge during negotiations with the NCTC their need to make up the revenue amounts they are not about to secure from Comcast, TWC or other large MVPDs. Specifically, some programmers have stated their intention to make up lost revenues resulting from their negotiations with Comcast, TWC or others directly through their agreements with NCTC members and other small MVPDs. There is no reason to believe that programmers won't continue to seek

[64] Fickle Declaration, ¶ 7.

[65] Fickle Declaration, ¶ 8.

> concessions from NCTC to make up for the increase in lost revenues after the Comcast/TWC/Charter deal is approved. The Comcast/TWC/Charter merger will put programmers in an even worse position in their negotiations with Comcast and Charter. This is why I expect programmers to make up revenues on the backs of small cable operators in the event the Comcast/TWC merger is approved.[66]

NCTC is not the only entity to believe that all MVPDs smaller than Comcast will be harmed by the transaction. As DISH Network, the second largest DBS providers and third largest MVPD, recently explained:

> [A] combined Comcast/TWC will be able to exercise its enormous size to leverage programming content in anti-competitive ways. It will be able to extract lower prices from programmers, which, in turn, will force programmers to extract even higher rates from smaller pay-TV providers like DISH in order to compensate the programmers for lost revenue. And a combined Comcast/TWC will have the incentive and ability to restrict programmers' ability to grant digital rights to competing pay-TV and OTT video providers.[67]

The situation described by DISH will be even grimmer for the smallest MVPDs, who have far less bargaining power and leverage than a distributor like DISH, even when purchasing their national cable programming through a buying group like the NCTC.[68] This theory is explained in additional detail by Professor Biglaiser.[69] With substantially fewer subscribers, the smallest MVPDs will be most vulnerable to increased costs. This is both a public interest harm, and a competitive harm where Comcast and the small MVPDs compete directly.

In such markets, ACA members are at the largest competitive disadvantage. Comcast will be able to offer its subscribers the lowest possible prices, because Comcast receives the most

[66] Fickle Declaration, ¶ 9.

[67] *Applications of Comcast Corp. and Time Warner Cable, Inc. for Consent to Assign or Transfer Control of Licenses and Authorizations*, DISH Network, Ex Parte Presentation, MB Docket No. 14-57, (Aug. 1, 2014).

[68] Biglaiser at 14.

[69] Biglaiser at 15-17.

favorable rates from programmers. Competing small MVPDs, who are forced to accept higher rates from programmers, will have to recoup these higher costs by raising prices to their subscribers, putting them at a competitive disadvantage as opposed to Comcast. The small and diverse members of ACA are threatened the most under these circumstances.

This concern is far from hypothetical. The median number of subscribers per member is less than 1,500, or less than a fraction of one percent of video subscribers nationwide. In the *Comcast-NBCU Order*, the Commission recognized the differences in bargaining power between the largest and smallest MVPDs. In some instances, programmers have admitted that they are forced to account for negotiations with Comcast, as it currently exists, when negotiating with smaller MVPDs.[70] This forces the programmers to be even more rigid with small MVPDs, causing disruption to the negotiation process and raising the costs of the small MVPDs in order for the programmer to make up for lower profits. The larger Comcast gets, the more the existing problem is exacerbated. Through the Comcast-TWC-Charter transaction, the gap between the largest MVPDs and the smallest MVPDs widens significantly. The larger the gap between these competitors, the more likely that harm may result. This harm impacts competition in output upstream, and programmers and small MVPDs alike suffer.

D. The Proposed Transaction Will Give Comcast Greater Control and Leverage to Disadvantage MVPD Rivals in Advertising Markets.

ACA members and other competing MVPDs will also be harmed through Comcast's increased control and leverage in the spot cable television advertising market. As analysts estimate that advertising will account for gross sales of $5.08 billion in 2014, this is an important revenue source for MVPDs.

[70] Fickle Declaration, ¶ 9.

Today, Comcast and TWC each own, control or are involved with significant spot cable advertising representation organizations. All national advertisers place spot cable advertising through one national representation firm, the National Cable Communications ("NCC") which represents national spot advertising sales for cable, satellite, and telco programming distributors across the nation. Comcast, together with TWC and Cox Media, are owners of NCC.[71]

In addition, each regional advertiser places spot cable advertising through an "Interconnect" – a joint sales and technical integration entity comprised of MVPDs that serve a given DMA. Generally speaking, the Interconnect is managed, and therefore controlled, by the dominant MVPD in the DMA. In the top markets across the country, this is either Comcast or TWC.

Advertisers can place spot cable advertising, which is the most local advertising, through an MVPD directly or through its spot cable advertising representative. Comcast also owns Comcast Spotlight, the advertising sales division of Comcast Cable, which provides spot cable advertising representation services to competing MVPDs such as Verizon, AT&T, DISH, DirecTV, Wide Open West and RCN. TWC, through Time Warner Cable Media Sales, also sells video and online advertising to local customers and cable spot advertising representation to other MVPDs.[72] These services allow smaller MVPDs to participate in ad sales more effectively and economically than they could on their own, by providing technical infrastructure and staff to run the advertising operations. In addition to Comcast and TWC, there are also independent providers of spot cable advertising representation services, such as Viamedia, Inc. ("Viamedia").

[71] Application at 11.

[72] Application at 16.

MVPD competitors of Comcast can choose to use independent companies such as Viamedia so that they are not cooperating with a competitor for advertising sales.

After its acquisition of TWC, Comcast will have a greater degree of control in all aspects of the spot cable advertising market, including the NCC, Interconnects, and representation services. For example, in the New York DMA, the largest media market in the country, today there are two Interconnects, a "quasi-interconnect" managed by Cablevision that includes Comcast, and an Interconnect managed by TWC. Following the transaction, Comcast intends to integrate TWC's advertising operations with Comcast's.[73] This increased control and leverage may give Comcast another lever to raise competing MVPDs' costs, restrict its competitors' advertising capabilities, and harm consumers.

Existing problems in the spot cable advertising market will be exacerbated post-acquisition. Comcast will move from partial control to a majority owner of NCC, the clearinghouse through which advertisers can purchase ads nationwide. By acquiring TWC, Comcast will own 80% of NCC and will likely acquire veto authority at the board level. This will give Comcast the ability to restrict its competitors' access to NCC. In addition to controlling two Interconnects in the New York DMA, Comcast will also gain increased control over the regional Interconnects. Post-acquisition, Comcast will control over 50% of all Interconnects in the United States and 18 of the top 25 Interconnects. This control will give Comcast another avenue through which it can harm competitors by giving it greater ability to refuse its competitors access to a broader range of Interconnects across the country.

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[73] Application at 102, n. 257.

Furthermore, Comcast will gain additional control and leverage through its spot cable advertising representation services, which are already highly successful but will become even more so post-acquisition. With Comcast's increased control over NCC and the Interconnects, Comcast will have greater control in dictating whether competing MVPDs will be able to gain access to the NCC and the Interconnects, and the terms and conditions of such access. Comcast may force MVPDs to utilize its Comcast Spotlight for spot cable advertising representation as a condition for gaining access to the NCC and the Interconnects, in lieu of doing spot cable advertising on their own or through a competing spot advertising agent, like Viamedia.

Post-acquisition, Comcast will be in a stronger position to control the spot cable advertising market and disadvantage competing MVPDs. This may result in higher costs for competing MVPDs, small businesses and consumers who will lose the benefits of vigorous competition in this market.

IV. THE ARBITRATION REMEDY THE COMMISSION HAS USED TO AMELIORATE COMPETITIVE HARMS OF OTHER TRANSACTIONS IS INADEQUATE TO PROTECT SMALLER MVPDS FROM THE HARMS OF THIS TRANSACTION

A. The Commission Created an Arbitration Remedy in Recognition of the Fact that its Rules Are Otherwise Insufficient to Protect Against Certain Merger-Specific Harms.

The Commission has long recognized that its program access rules, even in combination with voluntary commitments by merging parties, are inadequate to ameliorate the harms of transactions between programming suppliers and distributors.[74] In its most recent iteration in

[74] See, e.g., *News Corp.-Hughes Order*, 19 FCC Rcd at 513-514, 551, ¶¶ 84-87, 169 (finding that a strategy of uniform price increases for video programming would not necessarily violate the program access rules and agreeing "with commenters that both the program access rules and the Applicants' proposed program access commitment are insufficient to protect against harms arising from News Corp.'s enhanced incentive and ability to use its market power in the market

Comcast-NBCU, the Commission once again imposed remedial conditions that employed a "baseball-style" arbitration process for programming disputes with Comcast, including those involving retransmission consent, with modifications over forms of this remedy the Commission had previously employed. In baseball-style arbitration, an aggrieved MVPD can initiate the process. Both the MVPD and Comcast are required to submit "final offers" at the outset to the arbitrator that each side believes reflects the fair market value of the programming at issue.[75] The arbitrator then chooses the final offer that most closely approximates the fair market value of the programming at issue. To determine fair market value, the arbitrator may consider any relevant evidence, including current or previous contracts between MVPDs and broadcast stations, national networks, or RSNs. Each party is also required to submit all other evidence that it intends to rely on in the arbitration.

Recognizing that small and mid-sized MVPDs could be at a particular risk, the Commission instituted one-way fee shifting in an attempt to make the arbitration remedy work for smaller MVPDs. Under the one-way fee shifting provisions, if an MVPD with 600,000 or fewer subscribers is the prevailing party in the arbitration, it is entitled to recover its legal fees and the costs of arbitration. Additionally, if the small MVPD loses, it is not required to reimburse Comcast's corresponding fees and costs.

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for regional sports programming to the detriment of consumers."); *Comcast-NBCU Order*, 26 FCC Rcd at 4259, ¶ 49 (finding program access rules insufficient to remedy the potential harm of Comcast's increased incentive and ability to uniformly raise its rivals' fees).

[75] The aggrieved MVPD is required to submit its final offer no later than the end of the 15th business day following its formal filing. Comcast is required to file its final offer within two business days of being notified that a formal demand for arbitration has been filed. *See Comcast-NBCU Order*, 26 FCC Rcd at 4365, Appendix B, ¶ 7.

Although ACA is deeply appreciative of the Commission's attempt to make the arbitration remedy useable for smaller MVPDs, the result can at best be described as an incomplete success. Unfortunately, for smaller MVPDs, in practice the *Comcast-NBCU* remedial conditions did not create a feasible remedy, leaving them unprotected from the recognized harms posed by the merger. These MVPDs will be at an even greater risk if the proposed transaction that will vastly expand Comcast's distribution footprint and programming heft is consummated. Indeed, the arbitration procedures were not designed for nor applied to address the scale of the harms described above.

The experience of ACA members before and after the Comcast-NBCU transaction has demonstrated the inadequacies of the Commission's baseball-style arbitration condition to address the harm from that transaction. In particular, the baseball-style arbitration provisions adopted in the Comcast-NBCU transaction are of no utility to smaller MVPDs due to the uncertainty and information imbalance in the arbitration process and the high fixed costs of arbitration, among other factors. Indeed, even when acting collectively through their buying group, the NCTC, smaller MVPDs were not adequately protected by the arbitral process. These factors are described in the sections below in additional detail.

Before proceeding to that detail, it bears emphasis that the other competition and policy threats from this transaction – disparity in bargaining power and control over spot advertising – aggravate the risk to small MVPDs from abuse by Comcast and TWC of their control over their owned content. That aggravated risk underscores the inadequacy of baseball-style arbitration.

B. Uncertainties in Preparing a Final Offer in Advance of Discovery Put Smaller MVPDS at Particular Risk in Initiating the Arbitration Process.

A number of uncertainties in preparing a final offer in accordance with the baseball-style arbitration process put small MVPDs at a competitive disadvantage when faced with an impasse in negotiations. These uncertainties amplify a small MVPD's hesitation to enter the arbitration process.

First, small MVPDs lack the critical information necessary to propose and predict a successful result. Because small MVPDs do not have precise information on the factors that an arbitrator would like use to make its determination on a fair rate, the MVPD is often unable to accurately and confidently estimate a fair rate. For example, small MVPDs do not have information on the existing and previous prices Comcast charges other similarly-situated MVPDs for the disputed programming. Nor do these small MVPDs know what other programmers are charging for similar programming. These programming rates may also include a "small MVPD premium," which increases the rate a small MVPD pays above a larger MVPD, based on their smaller amount of subscribers. While small MVPDs are generally aware of this "small MVPD premium," they are unable to accurately determine the amount of this premium. This is information that Comcast already has, and therefore, when Comcast is estimating a fair rate, it is more able to predict a successful result with significantly greater certainty.

As Mr. Fickle states, during NCTC's most recent renewal negotiations with Comcast at the end of 2012, NCTC considered utilizing the baseball-style arbitration condition the FCC imposed on Comcast when it acquired NBCU. NCTC had reason to believe that Comcast/NBCU was not offering it fair market rates, terms, and conditions. However, after careful consideration, NCTC decided that the arbitration condition was inadequate and ineffective, even with one-way fee shifting in the event it won, to address the unfair demands of Comcast/NBCU for several reasons, including NCTC's inability to reasonably evaluate the likelihood of success in arbitration, "because [NCTC] lacked critical information on key factors that an arbitrator would likely use to make its determination of fair-market value. Without this information [NCTC] could not make an informed 'final offer.'"[76]

Small MVPDs also do not have information on the costs of acquiring the content that comprises the programming at issue. While programmers, such as Comcast, generally have evidence of the value of the programming, including internal studies or discussions of the imputed value of the programming, small MVPDs who do not also distribute programming have no way of estimating these internal costs.[77]

In each stage of the arbitration process, from deciding to enter arbitration, to proposing a fair rate, this information imbalance puts small MVPDs at a distinct disadvantage in their ability to predict a successful result. This renders the arbitration process of no use to them.

Additionally, differences in arbitrators, and a lack of public information on similar arbitration decisions, also add to the uncertainty. This makes it almost impossible for a small MVPD to learn about the baseball-style arbitration process and to plan for the full time and effort of the process. ACA has anecdotal evidence of small MVPDs who have reported not understanding the general process or the steps required to go through the process. These MVPDs

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[76] Fickle Declaration, ¶¶ 11-12.

[77] Fickle Declaration, ¶ 13 ("At the same time, Comcast/NBCU had perfect information. Comcast/NBCU possessed information on the prices it currently and formerly charged other MVPDs for its programming. It also knew the prices it granted to larger MVPDs as opposed to smaller MVPDs, and what other programmers charged for similar programming, particularly with regard to broadcast stations due to the fact that Comcast operated as an MVPD in dozens of designated market areas. We knew with all of this information available to them, they would be able to more accurately calculate a fair market value and provide it as its "final offer." Moreover, an arbitrator would find the information that Comcast had highly probative, and would likely rely upon it in determining which of the parties' 'final offer' is closer to fair market value.").

admit that they underestimated the resources necessary to navigate the process and to predict a fair rate. Without access to similar arbitration decisions, the small MVPDs are often left with nothing to compare their rate estimates.

C. Small MVPDs With Fewer Subscribers and Financial Resources are Risk Averse.

In addition to the uncertainty and information imbalance in the arbitration process, other risks add to the disadvantages inherent in the process for small MVPDs. For example, from the perspective of a small MVPD with fewer subscribers and financial resources, the high fixed costs of the arbitration process are generally in excess of any potential benefits. Arbitration involves drafting and submitting an initial filing, participating in multiple hearings and producing evidence of market rates. Each of these steps in the process requires assistance from attorneys and other consultants, including economists and data analysts, which adds to the costs. Even with one-way fee shifting, if the MVPD loses, these costs are not reimbursable. Additionally, the arbitration process, from start to finish, can take one year or longer to complete, and requires key personnel to take large amounts of time from their regular jobs, further adding to the costs.

The financial risk of arbitration for a buying group like the NCTC is not much better. As Mr. Fickle explains, his research revealed that "the average cost of baseball-style arbitration is approximately $1 million. This represents a significant cost compared to both NCTC's annual operating budget, and our best guess at how much Comcast was charging us above the fair market value of the programming."[78] As the end result, taking into account the risks posed by uncertainties as to timeframes and the lack of critical information to make an "informed 'final

[78] Fickle Declaration, ¶ 14.

offer,'" NCTC found the risks and costs of baseball-style arbitration would outweigh any potential benefits obtainable through a successful arbitration.[79]

When all of the costs of the arbitration process are added together, this amounts to a relatively large share of a small MVPD's revenues, especially as compared to the average number of subscribers. The costs of proceeding through the arbitration process are relatively fixed regardless of an MVPD's number of subscribers. However, the potential benefit arising from the arbitration – lower programming fees – is directly proportional to the number of subscribers. Therefore, the cost of engaging in an arbitration proceeding becomes progressively less attractive to an MVPD the smaller it is. The Commission recognized this reality in the *Comcast-NBCU Order*: "Given the size of their subscriber bases and financial resources, small and medium-sized MVPDs may be less able to bear the costs of commercial arbitration than large MVPDs, thus rendering the remedy of less value to them."[80]

Additionally, the MVPD risks losing the arbitration and bearing the total costs of the arbitration and the added burden of higher programming costs. With this end result, the small MVPD has expended hundreds of thousands of dollars and endless hours to go through the arbitration, only to then pay higher rates for programming. Professor Biglaiser analyzes these risks and costs in the accompanying analysis.[81] These possibilities provide a risk-averse small MVPD the incentive to save the time and effort required to go through the process, and to accede to the pressure and demands of the programmer.

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[79] Fickle Declaration, ¶ 15.

[80] *Comcast-NBCU Order*, 26 FCC Rcd at 4262, ¶ 58.

[81] Biglaiser at 33-36.

D. Smaller MVPDs are at Greater Risk of Retaliation by Comcast.

ACA believes that the risk of retaliation is an additional reason that arbitration is an inadequate remedy for small and mid-size MVPDs. ACA has heard anecdotal evidence from MVPDs who feel that programmers have an incentive to make up any expenses from the arbitration and any lost fees as a result of a lost arbitration through future contract negotiations. These MVPDs feel that using arbitration is a "zero sum game," especially when the next time they need to negotiate the arbitration conditions have expired, or are no longer available to them. In such a case, the lack of availability of arbitration for the next negotiation is a deterrent for using the arbitration in the first instance.

E. Other Factors Add to the Problems with Use of the Arbitration Remedy by Smaller MVPDs.

In addition, other factors exacerbate problems with the arbitration remedy. Smaller MVPDs experience problems getting started in the process. When conditions are first introduced and there is no track record of arbitration results to consult, small MVPDs will be especially poorly informed and skeptical of the process. The first few MVPDs who test the remedy will bear especially high risks. Accordingly, there is a particular risk that arbitration will never be tested because of this higher test risk. This continues to be a problem with regard to the conditions adopted to mitigate the harms of the Comcast-NBCU transaction, which for many of the reasons addressed herein have never been utilized by any small MVPDs.

Another problem is that a vertically integrated programmer subject to an arbitration provision, like Comcast, is likely to outspend its opponents in arbitration. Comcast may find it both rational and profit-maximizing to outspend its opponents in the arbitration process. The programmer will have a reputational incentive to expend significant effort in its earliest arbitrations, particularly with risk-averse small MVPDs, to discourage other small MVPDs from undertaking subsequent arbitrations. Moreover, since a vertically integrated programmer like Comcast will be in multiple arbitrations and can reuse many aspects of its preparations in later arbitrations, it will likely be able to do more with the money it spends.

V. CONCLUSION

The Applicants propose an unprecedented consolidation of content and expansion of distribution. The proposed transaction would create significant horizontal and vertical harms, resulting in higher costs to consumers and reduced competition, especially with the smallest MVPDs. Without adequate remedies, consumers and competition will suffer from the Comcast-TWC-Charter deal. Should the Applicants be unable to develop and propose enforceable commitments to address the harms identified by ACA, the Commission must do so to protect competition and consumers.

Respectfully submitted,

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EXHIBIT A

The Harms of Comcast-TWC-Transaction*

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Table of Contents